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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMONT DALE KENDRICK-GREYWOLF,

Defendant and Appellant.

C045321

(Super. Ct. Nos.
CM019077, CM018970)

During a heated argument, defendant Raymont Dale Kendrick-Greywolf spit on his wife, poured alcohol over her, and slammed her head into a wall. One month later, defendant and his wife argued again, and defendant threatened her with a gun. Defendant ultimately went to trial on five counts: assault with a firearm (Pen. Code, § 245, subd. (a)(2)), corporal injury to a spouse (Pen. Code, § 273.5, subd. (a)), spousal battery (Pen. Code, § 243, subd. (e)(1)), evading a police officer (Veh. Code, § 2800.1, subd. (a)), and unlawful taking or driving of a

vehicle (Veh. Code, § 10851, subd. (a)).¹ A jury found defendant guilty of corporal injury to a spouse, domestic battery, and evading a police officer. The jury acquitted defendant of assault with a firearm and unlawful taking of a vehicle.² Sentenced to three years, defendant appeals, contending: (1) insufficient evidence supports his conviction of evading a police officer, (2) the court considered improper criteria in sentencing, and (3) there is insufficient evidence of defendant's ability to pay attorney fees. We find the last contention has merit and shall remand for a determination of defendant's ability to pay attorney fees. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's convictions stem from two incidents of domestic discord between defendant and his wife Rachel.

April 16, 2003: Spousal Battery, Evading a Peace Officer, and Unlawful Taking of a Vehicle.

During an argument with defendant, Rachel attempted to leave the couple's apartment. Defendant blocked her exit. Rachel tried to call out the window for help, but defendant pushed her away from the window. Defendant slammed Rachel's head into a wall, spit on her, and poured alcohol over her.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The clerk's minutes erroneously record that the jury found defendant guilty of unlawful taking of a vehicle.

Rachel called 911, but defendant grabbed the phone. Defendant told her he might as well kill them both before the police arrived.

Officer Brett Smith responded to the 911 call. As Smith entered the parking lot, bystanders pointed to a tan Hyundai automobile. Surmising the driver was attempting to flee the scene, Smith tried to block the car, but the Hyundai managed to drive around the patrol car and leave the lot.

Smith followed in his marked patrol vehicle after turning on his overhead lights. Defendant circled the block, running a stop sign, and as the car slowed down, he jumped from the Hyundai and fled on foot. Defendant did not have permission to drive the Hyundai.

Smith and another officer pursued defendant on foot. Defendant refused to stop and grabbed Rachel, who was standing in the apartment parking lot. The officers drew their guns and ordered defendant to lie on the ground. After holding Rachel for a few more moments, defendant complied and was taken into custody.

May 11, 2003: Assault with a Firearm and Corporal Injury to Spouse

On May 10, 2003, Rachel asked her cousin, Priscilla Anderson, if she and her son Jesse could stay with Anderson. Rachel told Anderson she and defendant had been arguing. Anderson agreed, and Rachel spent the night. During the night, defendant threw rocks at Anderson's window. Anderson repeatedly

told him to stop but did not call the police because she had no phone.

The following morning, Rachel returned to the couple's apartment to take a shower. Anderson heard loud music and heard Rachel scream: "'Get off me. Let me go.'" Rachel's son went to the apartment and knocked on the door. The music ceased, and Jesse and Rachel ran out of the apartment and down the stairs.

Jesse and Rachel returned to Anderson's apartment. Anderson described Rachel as "hysterical" and upset. Crying, Rachel told Anderson, "'He had a gun to my head.'" Rachel asked Anderson to call the police from Michelle Clark's nearby apartment. Clark, who also observed Rachel crying, had already contacted the police.

Officer Scott Ruppel responded. As Ruppel arrived at the apartment complex, defendant spotted him and fled on foot. Officers apprehended defendant a few blocks away.

Clark told Ruppel she heard loud music followed by loud arguing by a man and a woman. The woman was yelling at the man to get off her and that she wanted to leave. Clark called police because the argument sounded as if it was "getting physical."

Ruppel also interviewed Rachel following the incident. Rachel was fearful but calm.

Rachel stated she and defendant were married and living in the apartment. Rachel spent the night at Anderson's but returned to the apartment to take a shower and change her clothes. As she dressed, defendant startled her. Defendant had

a towel in his hand that he held to the side of Rachel's head. Defendant asked, "'Why are you going to make me do this?'" Rachel saw the barrel of a gun under the towel. Defendant held the towel a few inches from her head. Rachel told defendant to go ahead and shoot her. Her words gave defendant pause.

Rachel told Ruppel that defendant unloaded the gun magazine, wiped the gun down with a towel, and put it on the bed. Rachel described the gun as a black semiautomatic handgun. When Rachel began to leave, defendant grabbed her around the waist and threw her into the bathroom toward the bathtub. Rachel managed to catch herself by grabbing the shower curtain.

The couple began to argue, and defendant told Rachel she was dirty and needed to be cleaned. He attempted to take her clothes off. Rachel screamed at defendant to let her go and to get off of her. Defendant then threw her into the bedroom. Rachel sustained bruises to her side, rib cage, and waist.

Rachel told Ruppel that when defendant heard someone knocking at the door, he said: "'You better hope it is not the cops.'" Defendant opened the door and saw Jesse; Rachel and Jesse left the apartment.

After being advised of his *Miranda* rights, defendant told Ruppel he had recently been released from jail.³ Defendant believed his wife was having an affair because he saw her leaving another man's apartment. When she returned to their

³ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

apartment, the couple quarreled about her infidelity. Defendant denied any abuse and denied possessing a gun. He explained that bullets found in his possession were in his pocket because he had been target shooting with friends, and he had had the bullets for a couple of years. Defendant fled from the police because of prior bad experiences with the law.

Although a pat-down search revealed defendant had five .380-caliber bullets in his pocket, an extensive search of the area, including the apartment, failed to unearth a weapon. Officers located a single .380-caliber bullet on the floor of the bedroom as well as the towel Rachel described.

An information charged defendant with 10 counts. Prior to trial, the court granted the People's motion to dismiss five of the counts. Jury trial proceeded on the remaining five counts: assault with a firearm, corporal injury to a spouse, spousal battery, evading a police officer, and unlawful taking of a vehicle.

The officers and witnesses involved in the domestic drama all reaffirmed their earlier descriptions of events, with one major exception: at trial, Rachel testified defendant did not hurt her in any way. She denied any abuse on defendant's part and denied he had a gun. Rachel also testified she could not recall giving a statement to the police immediately following the May 11, 2003, incident. However, Rachel identified her signature on Officer Ruppel's report. Rachel visited defendant in jail and lied on a form in order to see him. She also filed for divorce.

The jury found defendant guilty of corporal injury to a spouse, spousal battery, and evading a police officer. The jury acquitted defendant of assault with a firearm and unlawful taking or driving of a vehicle. The court denied probation and sentenced defendant to three years in state prison for corporal injury to a spouse, with concurrent terms of one year for spousal battery and six months for evading a police officer. The court also ordered defendant to pay two \$600 restitution fines, with one fine suspended pending successful completion of parole; ordered restitution in an amount to be determined later; and imposed \$400 in attorney fees. Defendant filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence -- Evading

Defendant contends insufficient evidence supports his conviction for evading a police officer. According to defendant, the People failed to prove Officer Smith's patrol car exhibited at least one lighted red lamp.

In reviewing a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination of the trial court. To be substantial, evidence must be of ponderable legal significance, reasonable in nature, and credible. We draw all reasonable inferences in favor of the judgment. We may not reweigh or reinterpret the evidence. (*People v. Mercer* (1999)

70 Cal.App.4th 463, 466-467.)

Vehicle Code section 2800.1, subdivision (a) provides:

"Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: [¶]

(1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform." The prosecution must prove each statutory element beyond a reasonable doubt. (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 197-198 (*Acevedo*); *People v. Brown* (1989) 216 Cal.App.3d 596, 599-600 (*Brown*).)

The trial court instructed the jury on the elements of Vehicle Code section 2800.1. In addition, the trial court instructed: "A vehicle operated by a police officer or peace officer is distinctively marked when, in addition to a lighted red lamp and activated siren, the vehicle is of such appearance that a reasonable person would be able to recognize it as a peace officer's vehicle, and a person fleeing is on reasonable notice that pursuit is by a peace officer."

Discussion

Defendant argues: "[T]here is absolutely no evidence that the patrol vehicle that pursued [defendant] . . . possessed 'a lighted red lamp visible from the front.' The evidence merely establishes that [defendant] was pursued by a marked patrol vehicle occupied by a uniformed officer, who, during the chase, turned on his siren and his overhead lights." In support, defendant relies on *Brown* and *Acevedo*.

In *Brown*, the pursuing officer testified she turned on the overhead signal lights on her police car. The squad car was capable of displaying three possible signal light options, depending on the position of the activation switch: a flashing amber light to the rear; blinking blue and white lights to the front and rear; or rotating red, blue, and white lights. The officer could not recall which lights she activated. The defendant testified he saw the officer ""turn her lights on."" (*Brown, supra*, 216 Cal.App.3d at p. 599.) The People conceded that insufficient evidence supported the defendant's conviction for evading a police officer. (*Ibid.*)

The appellate court reversed and dismissed the conviction. The court noted that where the proven facts give equal support to two inconsistent inferences, neither is established. The court found: "Here, the evidence established that Officer Wilson's lights were on, but not whether any of them were red. [Fn. omitted.] Accordingly, we conclude that there was no evidence of an essential element of the offense, and reverse." (*Brown, supra*, 216 Cal.App.3d at p. 600.)

In *Acevedo*, the appellate court, citing *Brown*, reversed the defendant's conviction for evading a police officer. At trial, the only evidence of a red light was the officer's testimony that he activated his overhead emergency lights with the siren. (*Acevedo*, *supra*, 105 Cal.App.4th at p. 197.) The court found this testimony insufficient, concluding: "[T]he prosecution simply failed to close a sizable evidentiary gap mandated by the terms of the statute *Acevedo* allegedly violated. It is a gap that could have been easily bridged: when the officer testified about activating his lights, he could have been asked one or two more questions to verify that the lights he was talking about satisfied the statutory visibility requirements." (*Id.* at p. 199.)

In the present case, Officer Smith testified: ". . . I activated the overhead emergency lights." Smith also stated he drove a marked police car. Under the reasoning of *Smith* and *Acevedo*, this testimony, taken alone, is insufficient to support a conviction under Vehicle Code section 2800.1, subdivision (a).

However, as the People point out, two other factors enter into our analysis of the evidence before the jury: jury instructions and defendant's closing argument. The court instructed the jury pursuant to CALJIC No. 16.890, setting forth the elements of evading a police officer, including the requirement of one lighted red lamp. The court further instructed: "A vehicle operated by a police officer or peace officer *is distinctively marked when, in addition to a lighted red lamp* and activated siren, the vehicle is of such appearance

that a reasonable person would be able to recognize it as a peace officer's vehicle, and a person fleeing is on reasonable notice that pursuit is by a peace officer." (CALJIC No. 12.87, italics added.)

The People contend that, given Officer Smith's testimony the vehicle was "'marked,'" the jury could reasonably deduce from the instruction's language that Smith's patrol car was equipped with "'a lighted red lamp.'" The People note defense counsel agreed to the instruction and never sought clarification of the instruction.

In addition, defense counsel discussed the red lamp during closing argument: "She points to a vehicle, and [defendant] is in the vehicle, but the officer says, hey, stop, and he doesn't. He gets in his car and he follows them, and he is charged with the crime of evading a police officer. . . . [A]m I going to stand in front of you and say he didn't see lights, he didn't hear the siren, he didn't know it was a police officer? Absolutely not. I would have to be foolish, but what I will ask you to do is look at the instruction 16.890 and what that instruction says. *Yep, we have a police officer, uniformed, distinctive car lights, siren. Hey, all those things are easily established. No dispute here.* But his driving has to be with the specific intent to evade the police officer, and you say, well, he didn't stop. You are right, but was he failing to stop with the intent to evade the police officer? One might have expected, let's see, high speeds. We never heard anything. Turn down an alley. We know there are some, [O]fficer Smith

said there were. We saw this overhead photo. Turn on another street, try to ditch the officer, but what did he do? He drove around the block and came back basically to where he started from. Now does that sound like a circumstance where he is trying to evade a police officer? [¶] You know what the word evade means. Avoid apprehension. That is what it means. The guy drives around the block. Should he have stopped? Absolutely. Did he stop? No, he didn't. *Did he know it was a cop? Police car lights, siren, hey, no other way around it. Absolutely.* But he drove around the block, and he returned to where he started from." (Italics added.) During closing argument, the prosecution noted that defense counsel "concedes all the facts concerning the charge of evading a police officer, but he says that what is lacking is the specific intent to evade[.]"

The People argue defense counsel's statements regarding the appropriate lights were tantamount to a stipulation. The court instructed: "Statements made by the attorneys during the trial are not evidence. However, if the attorneys have stipulated or agreed to a fact, you must regard that fact as proven." According to the People, the attorneys essentially agreed there was no issue as to whether Officer Smith's vehicle exhibited a "'lighted red lamp visible from the front.'"

The People find further support in *People v. Peters* (1950) 96 Cal.App.2d 671 (*Peters*). In *Peters*, the defendant appealed his manslaughter conviction, arguing the cause of death had not been proved. The appellate court affirmed, finding the trial

court, the jury, the prosecution, and defense counsel all assumed the victim died from a knife wound inflicted by the defendant. (*Id.* at pp. 674-678.)

The court noted: "In a criminal case a defendant is not called upon to make explanation, to deny issues expressly . . . , nor is he required to point out to the prosecution its failure to make a case against him or to prove any link in the required chain of guilt. On the other hand, he cannot mislead the court and jury by seeming to take a position as to the issues in the case and then on appeal attempt to repudiate that position. A reading of the proceedings at the trial, including defendant's statement at the opening of his case and his argument to the jury at the end of the case, clearly shows that at no time was he questioning either that the knife wound caused Cole's death, or that that fact had not been established or was an issue to be resolved by the jury. It also shows that defendant was conceding the cause of death." (*Peters, supra*, 96 Cal.App.2d at p. 676.)

The *Peters* court found the jury may consider an admission of a fact made at trial in open court by a defendant or his or her counsel. (*Peters, supra*, 96 Cal.App.2d at p. 677.) According to the court: "It would be a miscarriage of justice to set aside a verdict found by the jury on all issues which defendant at the trial believed necessary to be submitted to the jury. After all, a criminal case . . . is not a game in which participants may be misled by a defendant's attitude and conduct at the trial, and then the verdict be set aside on appeal,

because defendant contends there was no proof of a fact which he had conceded" (*Id.* at p. 677.)

We find *Peters* persuasive. Here, Officer Smith failed to specify the color of lights his patrol car sported. However, defendant never questioned the lack of specificity. The court instructed that a marked patrol car includes a lighted red lamp. Defense counsel in closing argument essentially conceded the issue of the patrol car lights, focusing instead on defendant's lack of an intent to evade. Our review of the trial transcript reveals that at no time was defendant questioning whether Smith activated the required red lights on his patrol car. To paraphrase *Peters*: A defendant in a criminal case is entitled to the benefit of every reasonable doubt, but the record shows that by the conduct of defendant and all other participants at trial, no doubt was raised that defendant was conceding the existence of red lights on the patrol car. (*Peters, supra*, 96 Cal.App.2d at p. 678.)

Defendant counters that defense counsel did not concede the ultimate fact, the existence of the red light, but instead merely agreed that Officer Smith displayed "distinctive lights." In support, defendant relies on *People v. Lara* (1994) 30 Cal.App.4th 658 (*Lara*).

In *Lara*, the defendant appealed his conviction for driving without a license, arguing the trial court erred in failing to instruct on the corpus delicti. The People argued that since defense counsel conceded the fact that the defendant told a police officer he did not have a license, the error was waived.

(*Lara, supra*, 30 Cal.App.4th at p. 675.) The appellate court disagreed, reasoning: "Although counsel may, by express statement or unequivocal conduct, concede a fact at trial, perhaps thereby making the corpus delicti rule inapplicable as to that fact [citation], defense counsel here did not concede the ultimate fact. Rather, she conceded at most that defendant made the statement to Officer Sullivan." (*Ibid.*)

However, in the present case, defense counsel, in closing argument and by acquiescing to the instruction on the elements of the offense, conceded the ultimate fact: the existence of the distinctive red light.

II. Sentencing Error

Defendant also claims the trial court improperly relied upon conduct of which he was acquitted to deny him probation. Defendant argues the court considered the presence of a gun, although the jury acquitted defendant of assault with a firearm. In addition, defendant contends his trial counsel performed ineffectively in failing to object during sentencing.

Background

The jury acquitted defendant of assault with a firearm and convicted him of corporal injury to a spouse in connection with the May 11, 2003, incident. During sentencing, the trial court noted that at the time of the incident, defendant was on probation for a domestic violence misdemeanor. The court announced its intention to sentence defendant to the midterm sentence for the corporal injury charge, with other sentences to run concurrently.

Defense counsel argued in favor of probation. The prosecution urged the upper term, noting the alleged use of a deadly weapon. Defense counsel responded: "[H]e was acquitted on assault with a firearm, as the Court knows, so the Court can pay some credence to that; but with an acquittal, I think it is minimal as to how much importance the Court can place on the weapon allegation."

The court observed: "I think that the [section] 417 was offered by the defense. It was rejected by the People, as I recall, as a lesser included. The Court was convinced that there was a firearm present, based upon five rounds in the pocket, one round on the floor in the bedroom, very consistent with the statement made by the victim to the officer, that he discharged all of the bullets from the magazine when he was still in the bedroom; so even though there was an acquittal of assault with a deadly weapon, it is the Court's opinion he was brandishing that weapon as part of the domestic violence."

In sentencing defendant, the court stated: "The defendant is eligible for probation. However, the Court considers the fact that there is a likelihood that if not in prison the defendant will be a danger to others. The victim in this matter reported that there had been ten previous instances of domestic violence. There were two instances in this particular case that went to jury. [¶] The nature, seriousness and circumstances of the crime concern the Court. The defendant had .380 ammo in his pocket. One was found in the bedroom, as previously indicated, and although no gun was found, it is my opinion that there was a

gun present. [¶] The defendant does not appear to be remorseful. [¶] His prior record of criminal conduct indicates a pattern of increasingly serious criminal conduct. [¶] Prior performance on probation has been unsuccessful. Probation is . . . denied. [¶] It is the Court's intention to impose the middle term"

Discussion

Defendant contends defense counsel performed ineffectively in failing to inform the court that its reliance on the assault with a firearm was improper. According to defendant: "Instead, defense counsel argued that the trial court could only place minimal reliance on the assault with a firearm charge, an incorrect statement of the law." This failure, defendant asserts, resulted from ignorance of the law, not from a tactical decision on the part of defense counsel.

To establish a claim of ineffective assistance of counsel, a defendant must show deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability. (*People v. Mayfield* (1993) 5 Cal.4th 142, 175.) In assessing a defendant's claim, our review of counsel's performance is to be highly deferential. "'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

Defendant argues that under principles articulated in *People v. Takencareof* (1981) 119 Cal.App.3d 492 (*Takencareof*), the jury's acquittal of the assault with a firearm charge precluded the court's consideration of gun use during sentencing. In *Takencareof*, the defendant was charged with burglary and arson. The defendant pled guilty to burglary and the jury acquitted him of the arson count. During sentencing, the trial court referred to the great harm caused by the arson and denied the defendant probation. (*Id.* at p. 497.)

The appellate court remanded for resentencing, finding the trial court erred in considering the damage caused by the arson. The court found: "It would be anomalous to hold that if the jury finds the defendant not guilty of a count utilizing the constitutionally exacting standard of proof beyond a reasonable doubt, he should face the same alleged crime at sentencing under a preponderance of evidence standard. [¶] We are unprepared to hold that two standards operate simultaneously in a case where a defendant is acquitted. Such a holding would be ludicrous. A defendant who won a victory at the hands of the jury could nevertheless be subjected to a more harsh sentence if he was contemporaneously found guilty of another crime in the same case." (*Takencareof, supra*, 119 Cal.App.3d at p. 498.)

Defendant argues: "It makes no sense for the jury to have found Mrs. Kendrick's version of events credible as to the spousal abuse allegation, but not to the [firearm] assault, unless the prosecution failed to prove to the jury beyond a reasonable doubt that the assault was indeed committed with a

gun. [Fn. omitted.] . . . [¶] . . . The trial court should have surmised from the jury's verdict that the gun's existence, let alone its use in an assault, had not been proven beyond a reasonable doubt."

We disagree. As the People point out, defendant's argument ignores the fact that the jury could have found defendant used a gun even if the gun use did not amount to an assault. Indeed, during closing argument, defense counsel raised the specter of brandishing a weapon: "[The prosecution] argued to you that the assault was committed when he pointed the gun at her. I couldn't disagree more strongly and more with that statement.

[¶] The definition of assault says that it is an act which by its nature would probably and directly result in the application of physical force on another person [¶] But holding a gun is not a direct result of the application of physical force. . . . [¶] . . . [¶] Now you say to yourselves, well, holy cow, so what you are telling us . . . is that somebody can hold a gun to somebody else's head and not be a crime? Nope, I am not saying that. It is a crime. Not the one he is charged with. [¶] There is a crime called brandishing a weapon. If you brandish a weapon in a threatening manner . . . it is a violation of Penal Code Section 417. Absolutely. And if that crime had been charged, I would stand in front of you and say, number one, there wasn't any gun, but if you think there was, he is guilty of that offense. . . . [B]ut that is not what is in front of you."

Here, unlike the situation in *Takencareof*, the jury's verdict is not inconsistent with the trial court's finding that defendant possessed a gun during the domestic violence incident. The jury, as defense counsel discussed, could have acquitted defendant of assault with a firearm even though they believed defendant brandished a firearm during the argument. We find no error in sentencing and no incompetence on the part of defense counsel.

III. Attorney Fees

Finally, defendant argues insufficient evidence supports the trial court's finding that he has the ability to pay attorney fees. A determination that a defendant possesses the ability to pay is a prerequisite for entry of an attorney fee order. (§ 987.8, subd. (e).) Such a determination may be implied through the content and conduct of the hearings but must be supported by substantial evidence. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71; *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)

Under section 987.8, subdivision (g)(2)(B), "[u]nless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense."

Here, the trial court ordered defendant to pay \$400 in attorney fees. However, the trial court made no finding of unusual circumstances and held no formal hearing on defendant's ability to pay attorney fees. Therefore, we remand with

directions for the court to make a determination of defendant's ability to pay attorney fees.

DISPOSITION

The matter is remanded for a determination of defendant's ability to pay attorney fees. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P.J.

ROBIE, J.